UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published Monthly (Except July, August and September) by The Department of Law of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 57 DECEMBER NUMBER 3

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES

PERMISSIBLE CONTRACTS IN RESTRAINT OF TRADE.

A and B were non-competing telephone companies occupying the same field. Each desired to extend its activity through the territory occupied by the other and to accomplish this they entered into an agreement that each should build to a common point and that each should use the other's line. They mutually contracted not to compete with each other, that neither would compete with or take subscribers in territory occupied by the other, and that neither would enter into any other contract impairing any of the privileges and advantages acquired by the contract between the two companies. *Held* that this was not a contract in restraint of trade contrary to the common law, *Wayne Co.* v. *Ontario Co.*, 112 *N. Y. Sup.* 424.

The view that the law has taken in regard to contracts in restraint of trade has been gradually varied as commercial conditions have changed. In 1415 any contract in restraint of trade appears to have been void,[1] but by 1613 a partial restraint was permitted.[2] In 1711, in the leading early case on the subject, the doctrine was laid down that there could be a restraint unlimited as to time though it must be limited as to space.[3] The reason of the rule was that it was necessary in certain cases to allow such a contract in order to give persons the legitimate fruits of their toil, such as to allow one to sell the good will of a business, which would have been impossible had the vendor been prevented from binding himself not to engage in the same trade; and in order to facilitate the carrying on of certain business relations, such as agencies and apprenticeships, which could not have been carried on unless the agent or apprentice had been permitted to bind himself not to use his principal's or master's trade secrets after the termination of the relation.[4] The limitation as to space was added because it was thought that a contrary doctrine would cause the expatriation of the convenantor, he being considered unable to carry on another trade, and further because it was not necessary for the protection of the covenantee.[5]

The final test, however, was laid down to be one of reasonableness with regard to (1) the protection of the covenantee, and (2) any injury the restraint might do the public.[6] The legal reason given by Fry, J., for the change of test is that if you adhere to the rule making all contracts in restraint of trade over unlimited space bad, you are restraining those which are reasonable as well as those which are unreasonable, a result which no one can desire.[6] The political and economic causes of the change were that owing to modern conditions there was no danger of expatriation,[7] and that because of the shrinking in size of the commercial world the protection of the covenantee demanded that the restraint be more extensive than formerly.[8]

The rule that the contract must be reasonable with regard to the covenantee's protection without injury to the public shows that the main object of the contract must be the protection of

[1] Wald's Pollock on Contracts, Third Ed., by Sam'l Williston, 471.
[2] *Rogers* v. *Parry,* Bulstrode, 136.
[3] *Mitchell* v. *Reynolds,* 1 P. Wins. 181.
[4] *U. S.* v. *Addystone,* 29 C. C. A. 141 (1898), at p. 150.
[5] *Roussilon* v. *Roussilon,* L. R. 14, Ch. D. 351 (1880), per *Fry, J.*
[6] *Roussilon* v. *Roussilon,* L. R., 14 Ch. D. 351 (1880), at pp. 366-7.
[7] *Lee Herreshoff* v. *Boutineau,* 17 R. I. 3 (1890), at p. 6.
[8] *Lee Herreshoff* v. *Boutineau,* 17 R. I. 3 (1890), at p. 7.

the covenantee and the restraint must be ancillary, and that where this is the case the restraint is permissible.[9] It has been held, however, where the main object was the protection of the covenantee in his purchase of the good will of a business, that the contract was void as tending to a monopoly.[10]

The principal case is well within the rule. Each company virtually gave its lines over to the other to use as its agent and necessarily had to protect itself from misuse of the property by the agent—the main object was protection; and the public was not injured, especially as the companies were non-competing, but its convenience was enhanced by the contract.

May Damages be Recovered by a Non-Resident Alien for the Death of a Son?

In the dawn of English law there prevailed a notion that they, who had an interest in the life of a person, were entitled to compensation from him who wrongfully caused his death. The reparaton was known as *weregild,* and existed under the early Saxon laws.[1] When the forfeiture of goods to the king followed all homicide, the individual, seeing that no property remained from which he might satisfy his right, abandoned it. Thus the enforcement of *weregild* disappeared from the English law.[2] The action of an individual, on the death of another was recognized, without the pecuniary relief in the appeal of murder as late as 1819,[3] when the statute of 59 George III abolished this procedure. However vigorous this idea of the individual right persisted, the maxim of *actio personalis moritur cum persona* crept into the law at an early date and was invoked to prevent recovery for the death of a person.[4] Not until Lord Campbell's Act was this relief given.[5] Most American jurisdictions have passed statutes similar in their provisions to the English act,[6] allowing recovery by the kin of the deced-

---

[9] *U. S.* v. *Addystone,* 29 C. C. A. 141 (1898).

[10] *Lupkin Co.* v. *Fringeli,* 57 Ohio St. 596 (1898).

[1] Blackstone Commentaries, 188.

[2] *Shields* v. *Yonge,* 15 Ga. 349 (1854).

[3] *Ashford* v. *Thornton,* 1 Barn. and Ald. 405 (1818).

[4] *Higgins* v. *Butcher,* 1 Yel. 89 (1606); *Carey* v. *Railroad Co.,* 1 Cush. (Mass.), 1848.

[5] 9 and 10 Vict., c. 93 (1846).

[6] Mass. Stat. 1898 c, 535; Penna., Apr. 15, 1851, P. L. 675, sec. 22.